**CHUNG YOKE ONN**

**v.**

**C.S. KHIN DEVELOPMENT SDN. BHD.**

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. 2425 OF 1978]
19 APRIL 1984

***CONTRACT:*** *Claims for fees for professional services - Appointment as architect for three projects - First agreement with company not yet incorporated - Whether binding - Whether subsequently ratified - Abandonment of project - Whether any fees payable - Whether scale of professional charges of Federation of Malaya Association of Architects applicable - Whether claim statute barred - Subsequent agreements - Quantum - Costs - Whether plaintiff entitled to full costs.*

The plaintiff was an architect. He was appointed as the defendant's architect in 1962 by the late Mr. Choo Thiam Khin ("the deceased") to submit plans for the development of a piece of land along Jalan Birch, Kuala Lumpur ("Lot 447") at an agreed fee of 3½% of the construction costs. The defendant was only registered in 1963. The registered proprietors at the time of the appointment were Choo Cheeng Khay & Sons Sdn. Bhd., of which the deceased was the managing director. The proposed project was later abandoned for lack of response. The plaintiff was commissioned again in 1970 by the deceased who was then the managing director of the defendant, on two projects to develop Lot 447 as Bangunan Choo Cheeng Khay and Wisma Mirama. Fees were agreed at 3 ½% of the construction costs. Bangunan Choo Cheeng Khay was completed in 1975 and Wisma Mirama in 1976 and final certificates of fitness for occupation issued in 1981. The plaintiff claimed a sum of RM396,883.74 being the balance of professional fees due from and payable by the defendant for work done on the three projects on Lot 447. The defendant denied liability for the fees on the abandoned project and disputed the quantum regarding the other two projects.

**Held:**

**A. The abandoned project**

**[1]** The defendant were liable for the fees on the abandoned project.

(i) Though the contract was a pre-incorporation contract, there had been ratification of it by the defendant. Ratification can be by conduct and there was undisputed evidence that the plaintiff had acted for the defendant on the abandoned project on the instructions of the defendant after their incorporation.

(ii) The claim was not statute barred. Though the claim was being brought more than 6 years after the breach of the contract on the abandoned project, time only started to run from 7 December 1976, as the limitation period had been prevented from running before that by the part payments made by the defendant towards the plaintiff's account.

**[2]** The scale of professional charges then applicable to all members of the Federation of Malaya Association of Architects was applicable and the fee payable was 2/3 of the appropriate percentage of the estimated costs of the project.

**B. The other two projects**

**[1]** Regarding the fees for the remaining two projects, the plaintiff was entitled to rely on the estimates supplied to him by the defendant for the Bangunan Choo Cheeng Khay project, and on the progress payment report in respect of a Citibank loan to the defendant for the Wisma Mirama project.

**[2]** The defendant's submission that the interest claimed on the fees due on Bangunan Choo Cheeng Khay and Wisma Mirama should not be allowed on the ground of inordinate delay on the part of the plaintiff to obtain the final certificates of fitness for occupation must be rejected. The defendant had only themselves to blame for the delay.

**C. Costs**

The plaintiff was entitled to full costs. If the defendant had really admitted liability and had been genuine enough in setting the claim, they should have deposited the admitted amount into Court.

*[Judgment for plaintiff.]*

**Case referred to:**
*Harris v. Osbourn 2 C & M 629*

*For the plaintiff - S.Y. Chan (Chan with him)*
*For the defendant - K. Anananthan*

**JUDGMENT**

**Siti Norma Yaakob J:**

The plaintiff, in this case, is an architect, and he claims a sum of RM396,883.74 being the balance of professional fees due and payable from the defendant, a company incorporated for the purpose of *inter alia*, buying and selling movable property.

The appointment of the plaintiff as the defendant's architect dates back to 1962 when in June of that year, he was commissioned by the late Mr. Choo Thiam Khin, (the deceased), to submit plans for the development of land Lot no. 447 section. 69 off Jalan Birch, Kuala Lumpur, (Lot 447), at an agreed fee of 3½% on the construction costs. At that time, the defendant had not been incorporated yet, and that the registered proprietors of Lot 447 were Choo Cheeng Khay & Sons Sdn. Bhd. of which the deceased was the Managing Director. The defendant was only registered on 26 March 1983.

The proposed project on Lot 447 was the construction of two blocks of 13-storey flats consisting of 176 units and an arcade, and pursuant to the instructions given him, the plaintiff obtained the necessary approval for the planning permission on 18 November 1963 and approval of the architectural plans on 1 March 1965.

The proposed flats were then offered to the public for sale but as the response was very poor, the defendant instructed the plaintiff to print 2,000 colourful brochures in Hong Kong as a means of attracting the public. Even this proved unsuccessful and the reasons given for the unusual lack of interest were that the area of each flat was too big and the prices were too high for the market then. Realising that the project was too ambitious, the defendant abandoned it and construction of the 176 luxury flats and shopping arcade was never proceeded with.

Undaunted, the defendant pursued the idea of developing Lot 447 but for the second time round, the proposed flats were smaller in area and the prices asked for were less exorbitant. To that end, the plaintiff was commissioned again in 1970 by the deceased, who by this time, was already the Managing Director of the defendant, to submit fresh plans for the construction of 2 blocks of 20-storey flats consisting of 280 units altogether, to be called Bangunan Choo Cheeng Khay and

one block of 4-storey shopping arcade which was later known as Wisma Mirama. On 5 November 1970, the plaintiff submitted fresh plans to the authorities for the 2 projects and the building plans were approved in 1972. However, before construction started, the plaintiff, on the instructions of the defendant, made amendments to the approved plans by the addition of another floor to Bangunan Choo Cheeng Khay, thereby increasing the number of flats to 288 units and the addition of 4 penthouses and a tower office block was also added to Wisma Mirama. Fees payable on these 2 new projects were agreed at 3½% on the construction costs.

Construction on both projects began in 1972 with Bangunan Choo Cheeng Khay completed in early 1975, temporary certificate of fitness for occupation issued on 27 August 1975 and the final certificate of fitness for occupation issued on 4 February 1981. Wisma Mirama was completed in early 1976 with a temporary certificate of fitness for occupation issued on 20 March 1976 and the final certificate of fitness for occupation issued on 10 April 1981. Thus the qualifications mentioned in the Re-Amended Statement of Defence that the fees due on these two projects are not yet payable as final certificates of fitness for occupation have not been issued no longer existed at the trial although they were so when the pleadings were filed.

The total balance of fees claimed by the plaintiff is for work done on the three projects on Lot 447 namely, the abandoned project, Bangunan Choo Cheeng Khay and Wisma Mirama. The defendant has denied liability for fees on the abandoned project on the grounds that the contract between the plaintiff and the defendant was a pre-incorporation contract and since there has not been any subsequent ratification of it by the defendant the contract is null and void. However, if held liable, the defendant has also pleaded that the claim is bad in law as it is statute barred. As for the fees due on Bangunan Choo Cheeng Khay and Wisma Mirama, the defendant admits liability but only to the extent of RM136,466.35 as computed in para. 13 of the Re-Amended Statement of Defence.

From the evidence, it is clear that there were no documents to formalise the plaintiff's appointment as the defendant's architect as whatever instructions he received from the deceased were made orally based on the trust and friendship that the deceased and his two surviving brothers had with the plaintiff. In 1962, the deceased was the Managing Director of Choo Cheeng Khay & Sons Sdn. Bhd., owners of Lot 447 and together with his two brothers were in complete control of what appears to me to be the family's business concerns in that company. The same arrangement of control was also prevalent with the defendant as the deceased became its Managing Director upon its incorporation on 26 March 1963 and the deceased's two surviving brothers its directors and there are admissions in the Agreed Bundle of Documents that the defendant was formed solely to overcome some complex taxation problems arising from the family's large property dealings in Choo Cheeng Khay & Sons Sdn. Bhd.

Coming to the abandoned project, it is not disputed that the fees payable to the plaintiff is 3½% of the construction costs and that the amount becomes due and payable upon completion of the project. It is also not disputed that no agreement was reached between the plaintiff and the deceased as to the amount of fees payable in the event the project was abandoned. From this I can only conclude that abandonment never crossed the minds of either party when they embarked on the project and for that matter, the defendant alleges that in consideration of the plaintiff's services being retained for the Bangunan Choo Cheeng Khay and Wisma Mirama projects, he, the plaintiff, had agreed to forego his fees on the abandoned project.

To calculate the fees due under the abandoned project, the plaintiff relies on the Scale of Professional Charges then applicable to all members of the Federation of Malaya Association of Architects, P119. Under the Scale, the fee payable shall be 2/3 of the appropriate percentage of

the estimated costs of the project. The defendant has objected to this mode of calculation on the grounds that the parties never intended that P119 should apply. I do not consider that this objection can carry much weight as the Scale is there to determine the minimum scale of fees to be charged by an architect for professional services rendered and to cover those areas where there has not been any prior agreement reached on fees between the architect and his client. In this case, because of the very close relationship between the parties, fees for the abandoned project was never discussed and while appreciating the fact that a professional is entitled to claim for work done, the defendant cannot now object to the plaintiff falling back upon the Scale to calculate the amount of fees payable to him. In the absence of any tacit agreement, it is only right and natural that the plaintiff resort to the Scale to determine his fees on the abandoned project. In this respect too, I could not give any weight to the defendant's allegation that the plaintiff had agreed to forego his fees on the abandoned project upon his services being retained for Bangunan Choo Cheeng Khay and Wisma Mirama projects as there was no evidence to support that allegation.

Having ruled that the Scale is applicable, I now come to consider what is the estimated costs of the abandoned project upon which the plaintiff can base his calculation of his fees. For this he tendered P120 an estimate of costs of the project prepared by M/s. Langdon, Every and Seah, a firm of Quantative Surveyors. PW2, a partner of the firm, testified that he prepared P120 on the instructions of the deceased based on drawings supplied to him. As the building was never constructed he collaborated with the structural engineers to arrive at the figure of RM10,200,000 being the estimated costs of the abandoned project. For his base figure, the plaintiff excluded the sum representing 5% as contingency fee from his calculation and settled for RM9,793,000 as the estimated costs of the abandoned project. Objection was taken that the plaintiff could not rely on P120 as it was prepared for a different purpose altogether. For whatever purpose, P120 was prepared, the fact still remains that it is an estimation of costs of a project that was to have been constructed on Lot 447, but was later abandoned, the very same project on which the plaintiff claim that his fees are due. Of course, in a normal situation where an architect's fee for an abandoned project is disputed, the procedure is to have the works valued by an independent valuer. No such valuation was done in this case and I need not go any further than that to conjecture why this was so. It suffices for me to say that the plaintiff can rely on P120 to base his calculation of his fees on the abandoned project and accordingly on the formula of 2/3 of 3½% x RM9,793,000, the plaintiff's fee on the abandoned project comes to RM228,500.

I now come to the more substantial objections (1) who is liable to pay the fees as calculated above and (2) whether the claim is statute barred.

It is not disputed that the plaintiff's contract as the architect of the abandoned project is a pre-incorporation contract as at the time of his appointment, the defendant had not been incorporated yet. That being the case, the defendant contends that the contract is null and void and has no effect unless there has been a subsequent ratification of it by the defendant. Since the defendant has not passed any resolution to that effect, and since its Memorandum & Articles of Association, D195 allows only expenses connected with its incorporation to be charged to it, the defendant therefore could not be held liable for the plaintiff's fees. Under the circumstances, the plaintiff must turn to the person who appointed him, in this case the deceased's estate.

Ratification of a contract need not be evidenced in writing alone. It can also be inferred by conduct. In this respect, there is undisputed evidence that after the plans for the abandoned project were submitted to the authorities for approval, the plaintiff had also submitted other plans for the construction of 2 other projects namely the construction of one block of 11 and one block of 9 4-storey flats on a land adjoining Lot 447 belonging to Choo Cheeng Khay & Sons Sdn. Bhd.

Instructions for the submission of these plans were given to the plaintiff by the deceased before the defendant's incorporation but upon its incorporation, the defendant undertook the development of these 2 projects and the fees payable to the plaintiff were settled by the defendant. On the same token, the defendant had, upon its incorporation, taken over control of the development of Lot 447. It continued to retain the services of the plaintiff and held him up out to be its architect for the abandoned project in a letter of introduction addressed to a printer in Hong Kong (AB38). Since the defendant's case rested on correspondence in the Agreed Bundle of Documents, there has not been any express denial from the documents to show that the plaintiff was not its architect of the abandoned project although paragraphs 1 and 2 of AB105 denies liability for the fees on the grounds that the claim is statute barred and that there was some arrangement between the deceased and the plaintiff that in consideration of the plaintiff's services being retained for Bangunan Choo Cheeng Khay and Wisma Mirama projects, he would not claim his fees on the abandoned project. Since none of the surviving directors had come forward to refute or offer any explanation why the defendant had acted as it did, on the evidence presented to me, the only conclusion that I can reach is that the conduct of the defendant shows every intention that had the project not been abandoned for lack of public response, it would have developed and financed the project and happily paid the plaintiff his dues. On that finding, I hold that defendant is liable to pay the plaintiff's fees on the abandoned project. Upon that finding too and because of the close personal relationship of the plaintiff with the Managing Director of the defendant company, the defendant must have given the oral undertaking that it would settle the plaintiff's fees. My finding on this is further strengthened by the defendant's letter, AB105, addressed to the plaintiff's solicitors then, wherein the surviving directors of the defendant company eluded to some arrangement wherein the plaintiff had agreed to forego his fees on the abandoned project in consideration of his services being retained for the Bangunan Choo Cheeng Khay and Wisma Mirama projects. It is because of this that the plaintiff had not made any claim for the fees until 1976 well after the deceased's death in 1974. The plaintiff has explained that he did not press for payment as he was aware that the defendants was facing great financial problems in developing its various projects. It is not disputed that in 1975, the plaintiff lent RM70,000 to Mr. Choo Thiam Siong, one of the surviving directors of the defendant company to assist in the completion of Bangunan Choo Cheeng Khay. As the defendant had no funds to make the repayment of this loan, Choo Cheeng Khay & Sons Sdn. Bhd. repaid the loan (See AB87 and 88). Difficulties were also experienced by the defendant to complete the construction of Wisma Mirama and it was only made possible after a 6 million dollar loan was obtained from Citibank. None of the surviving directors of the defendant company had come forward to support their allegation in their correspondence and the only witness for the defendant, a newly appointed director and a daughter of the deceased, admitted that her uncle, Mr. Choo Thiam Siong, would be able to testify to events that happened between the plaintiff and her father. But he chose not to come. And for this, I can only conclude that his evidence will not, in any way, assist the defendant. Be that as it may, there is sufficient evidence coming from the plaintiff that the only reason why he did not press for payment of his fees earlier was that he knew too well that the defendant did not have the necessary funds to meet his demand.

Coming now to the defence of time bar, the 6-year limitation period starts to run from the date of defendant breached the contract it had with the plaintiff. For this purpose, the defendant has urged me to treat its contractual obligations to the plaintiff on the abandoned project and the Bangunan Choo Cheeng Khay and Wisma Mirama projects as two distinct and separate contracts. Thus, at the very latest, the contract on the abandoned project came to an end on 5 November 1970, the day the defendant submitted the application for the planning permission for Bangunan Choo Cheeng Khay and Wisma Mirama projects. See AB 73. It is also submitted that the defendant

had breached the first contract at that date and clearly, this claim for fees on the abandoned project is statute barred as the plaintiff only commenced this action on 13 September 1978. The plaintiff, on the other hand, maintains that this is not so. Since his services were retained continuously for all 3 projects, there was in effect only one entire contract to govern all contractual obligations arising from work done on the 3 projects and as such, the Statute of Limitation does not apply. He equated his position to that of the Attorney whose contract with a client is an entire contract to carry on the suit to its termination and determinable by the Attorney only on reasonable notice and where no such notice has been given, the Statute of Limitation is no bar to that part of the demand which is for business done more than 6 years before the commencement of an action by the Attorney. *Harris v. Osbourn* 2 C & M 629 912. I cannot accept this argument as although it appears that the plaintiff had a general retainer with the defendant, his fees were based specifically on each project he undertook for the defendant and for that reason, the contracts, he entered into for each or joint projects are to be treated separately and individually. From this it follows that the contract on the abandoned project was breached by the defendant at the very latest on the day it came to an end with the submission of the application for planning permission of the subsequent developments on Lot 447 on 5 November 1970. Clearly this claim is therefore statute barred.

Having decided so, I now came to consider whether the defendant had done anything to have prevented time from running. There is evidence that it had made part payments towards account for the various developments on Lot 447. The first payment was for RM10,000 made on 28 September 1965, a subsequent payment for RM20,000 was made on 7 February 1972 (AB85) and the last payment of RM10,000 was made on 7 December 1976 (AB103). The defendant has not denied these part payments but has in AB110, explained that such payments were not made generally to account but were designated and appropriated as payments to specific projects and accredited into its account as such. However, the defendant produced no account books to explain these payments and on the evidence available, such part payments have the negative effect of preventing the limitation period from running and that time only started to run after the last payment on 7 December 1976. That being the case, the plaintiff's claim for his fees on the abandoned project is maintainable as it has not become statute barred.

For the remaining 2 claims, it is not disputed that the fees payable is 3½% of the actual costs of constructing Bangunan Choo Cheeng Khay and Wisma Mirama. As the only objection to these claims is on quantum, the short answer to this is for the defendant, as the developer of the 2 projects to come forward with the actual costs of construction so that the plaintiff's fees can be determined. However, it has not done so and the only conclusion that I can reach is that the actual costs must be more than the estimated costs relied upon by the plaintiff as the base figures in calculating his fees. In this respect, the defendant has not been very honest in its dealings with the plaintiff and for that matter too, is most reluctant to get the surviving brothers of the deceased to testify in Court. In this respect, for Bangunan Choo Cheeng Khay, the plaintiff relied on the estimates supplied to him by the defendant which is referred to as Schedule 1 (AB108). From this Schedule, the plaintiff has discounted certain items of expenditure for which he has not rendered his services and form the total of RM10,827,409.33 he has arrived at the base figure of RM8,667,000 from which his 3½% is calculated. The defendant in subsequent correspondence, following the demand objected to the calculation of certain items in the base figure namely out-door carpet, air-condition installation, water heaters and costs allocated to penthouse as being extras not provided for in the plaintiff's plans. The plaintiff explained that all the objected items are not extras but form part and parcel of the whole building and were included by him when drawing up the plans. As I have stated earlier if the defendant is truly genuine in its objection, it only needs to produce the actual figures of the construction to arrive at the true base figure.

But as this is not forthcoming, under the circumstances, the plaintiff can rely on the estimated figures contained in Schedule I, which was after all supplied to him by the defendant. To that extent, the plaintiff has proved the quantum of his fees based on 3½% on RM8,667,000 to arrive at the sum of RM303,345 being his fees due on Bangunan Choo Cheeng Khay.

For the fee due on Wisma Mirama, the plaintiff relies on the progress payment report, P121, prepared by Langdon, Every and Seah to enable Citibank to work out the disbursements to be made from the 6 million ringgit loan it granted to the defendant to complete the construction of Wisma Mirama. From P121, the plaintiff had excluded those items of expenditure not connected with his appointment and instructions and had placed the costs of the construction upon which his fee is chargeable at RM7,764,821.21 and working on 3½% of this sum, the fee due on Wisma Mirama is RM271,768.74. The defendant cannot possibly object to this method of calculation as P121 was prepared solely to guide Citibank to make proper payments on Wisma Mirama. Since there is reluctance on the defendant's part to disclose the actual figures, the plaintiff, by relying on P121, has proved the amount of his fees due on Wisma Mirama.

Lastly, I come to the defendant's submission that the interest claimed on the fees due on Bangunan Choo Cheeng Khay and Wisma Mirama should not be allowed on the grounds that there has been inordinate delay on the part of the plaintiff to obtain the final certificates of fitness for occupation for both projects. The temporary certificate of fitness for occupation on Bangunan Choo Cheeng Khay was obtained on 27 August 1975 and the final certificate of fitness for occupation was only issued 5½ years later, on 4 February 1981. Similarly in the case of Wisma Mirama, the temporary certificate of fitness for occupation was obtained on 20 March 1976 and the final certificate of fitness for occupation was obtained 5½% years later on 14 October 1981. There is undisputed evidence that the delay in the issue of the final certificates of fitness for occupation was not due to the plaintiff's fault but to the defendant's failure to comply with the Fire Department's requirements that fire precautionary installations be constructed at the completed buildings. Despite reminders from the plaintiff and the defendant's own project manager, the defendant had delayed to fulfill the Fire Department's requirements. Although there are allegations of delay against the plaintiff, the defendant has not established such allegations and since there is ample evidence that the delay occurred was caused by the defendant it has only itself to blame and the plaintiff cannot therefore be penalized for it.

On the question of costs, the defendant has also argued that the plaintiff should not be entitled to full costs on the fees due on Bangunan Choo Cheeng Khay and Wisma Mirama on the grounds that the defendant had all along admitted liability and had been willing to pay up. If the defendant had been genuine enough in settling the claim, it could have deposited the admitted amount into Court to save costs and at the same time prevent interest from running. This was not done and since costs must go to the successful party, the plaintiff is thereby entitled to his full costs.

Since there is no dispute as to the deductions made to give credit for sums already paid to account in the manner set out in para. 20 of the Amended Statement of Claim, judgment is entered for the plaintiff for sum of RM396,883.74 interest at the rate of 6% per annum from date of filing of suit until payment and costs.

Also found at [1985] 1 CLJ 89